INDEX.

Page

Opinion below and jurisdiction 1

Statement of the case 2

Argument 7

The question is local to the District of Columbia and is not of general importance 7

The decision of the Court of Appeals was clearly correct 8

TABLE OF CITATIONS.

Associated Wisconsin Contractors v. Lathers, 235 Wis. 14, 291 N. W. 770 (1940) 9

Atlas National Bank v. Holm, 71 Fed. 489 (C.C.A. 7th, 1896) 8

Cianciarulo v. Caldarone, 30 A. (2d) 843 (R. I., 1943). 8

City of Oakland v. California Const. Co., 15 Cal. (2d) 573, 104 P. (2d) 30 (1940) 8

Constructors Assn. of Western Pennsylvania v. Seeds, 142 Pa. 59, 15 A. (2d) 467 (1940)..... 9

Crocker v. United States, 240 U. S. 74 (1916)..... 9

Gesellschaft Fur Drahtlose Telegraphie M. B. H. v. Brown, 64 App. D. C. 357, 78 F. (2d) 410 (1935), cert. den. 296 U. S. 618 (1935) 9

Hazelton v. Sheckells, 202 U. S. 71 (1906)..... 9

In re Salmon, 145 Fed. 649 (W. D. Mo., 1906)..... 8

Kentucky Association of Highway Contractors v. Williams, 213 Ky. 167, 280 S. W. 937 (1926)..... 9

Marshall v. Baltimore and Ohio R. R., 16 How. 314 (1853) 9

Noonan v. Gilbert, 63 App. D. C. 30, 68 F. (2d) 775 (1934) 9

Oscanyan v. Winchester Repeater Arms Co., 103 U. S. 261 (1880) 9

Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co., 139 Fed. 780 (W. D. Pa., 1905) 8

Providence Tool Company v. Norris, 2 Wall. 45 (1864). 9

Reinstine v. Rosenfield, 111 F. (2d) 892 (C.C.A. 7th, 1940) 8

Page

Restatement of the Law of Contracts (1932)
Section 517, Examples 4 and 6 8
Steele v. Drummond, 275 U. S. 199 (1927) 9
Trist v. Child, 21 Wall. 441 (1874) 9
Valdes v. Larrinaga, 233 U. S. 705 (1913) 9
Williston on Contracts (Rev. ed. 1937)
Section 1663 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 522.

MAX SILVERMAN, *Petitioner,*

v.

OSBORNE REGISTER COMPANY, a Corporation.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF OSBORNE REGISTER COMPANY IN OPPOSITION.

Opinion Below and Jurisdiction.

The citation of the opinion below, 155 F. (2d) 879, and the statement of the jurisdiction are correctly given in the petition.

Statement of the Case.

The petitioner, Max Silverman, brought this action in the District Court of the United States for the District of Columbia claiming $280,000 from the Osborne Register Company for breach of an alleged contract which he vaguely

characterized in his complaint as an agreement "to join their resources for the purpose of consummating a contract with the United States for the manufacture and sale of ration tokens" (3).* After taking Mr. Silverman's deposition, and relying solely upon that deposition, the Osborne Register Company moved for summary judgment on the ground that the alleged contract was against public policy and illegal** (35). This motion was granted and the suit was dismissed (42). The United States Court of Appeals for the District of Columbia affirmed the dismissal (48).

The nature of the alleged contract upon which Mr. Silverman based his claim had remained vague and indefinite until his deposition was taken. That deposition purported to be a complete statement of Mr. Silverman's claim. Mr. Silverman testified that his contract was made with one Wiley Osborne (13, 14); that he had no conversations with Mr. Osborne during the period involved in this suit other than those which he described in his deposition (27, 28); that there was no formal contract in writing (27); and that he had told the complete story of the transaction to the best of his recollection (27).

The facts established by the deposition are clear. Mr. Silverman is in the business of selling pins and souvenirs (8), with an office at 120 West Forty-second Street, New York City (9). His force consists of a secretary, stenographer and himself, with another man who does a little work from time to time, but is not a regular employee (9). Mr. Silverman has no factory (9). The Osborne Register Company is a manufacturer of tokens, coins and emblems (2, 5). Mr. Silverman purchases his pins and souvenirs from such manufacturers and makes a profit on resales (9, 10).

---

* All references are to the pages of the transcript of record herein unless otherwise indicated.

** The Osborne Register Company also denied that it had any contract with Mr. Silverman (5), but for the purpose of its motion for summary judgment relied solely on the statements of Mr. Silverman's deposition, which must therefore be assumed to be true in the present review.

The character of Mr. Silverman's former dealings with the Osborne Register Company is shown by their mutual arrangement for the manufacture and sale of Red Cross blood donor pins. Mr. Silverman described this transaction as follows:

> "Now in so far as the Red Cross pin, I have placed an order for a million pins and buttons with the Osborne Register Company. (9).
> ". . . and on this Red Cross blood donor pin, may I add that I bought this pin and the buttons from Osborne Register Company for about $30 some odd a thousand, and while I spent an additional $10 on them I realized $60 odd a thousand. That made it quite a handsome profit." (10).

In stating his contention of how the alleged contract on which he now sues was made, Mr. Silverman said:

> " . . . on or about the 20th day of August, 1943, I telephoned Osborne. I told Wiley to send me some fiber tokens, some about the size of a little less than a dime, and some about the size of a nickel or a little over a nickel or a little lower than a nickel, and give me his quotation, and see that he mails me this by air mail as I will need same the following day, and give me his price so that I can bid on a contract.
> "On the 21st day of August I received a letter quoting me prices and enclosing some samples." (11, 12).

Mr. Silverman then described his discussions with officials of the OPA on August 21, 1943, and said that these officials were much impressed but that they finally told Mr. Silverman that he could not bid for the ration token contract because he did not have a factory (13). Mr. Silverman continued:

> "He then asked me where my factory was and I told him I had no factory. He said if you haven't got a factory you won't be able to bid, and I asked him why I would not be able to bid, I am now delivering a badge pin to you, and I have an order for a quarter of a million pieces, and you are pleased with the pro-

duction and you can check that with your purchasing department and Office of Emergency Management, they will bear me out.

"He said, 'I don't care anything about the badge business, this is one job if I have anything to do with it, it will be all from the manufacturer,' and I asked him his reason and he said, 'This job is so big that it is comparable to a Government mint.'

"He said 'We will have to first examine the plant to make sure that we can have our own guards, we can have surveillance over this particular plant, we almost would have to run the plant in order to protect the manufacturer of this article and see that it doesn't get into the hands of the people who are working at it, or that the tools and dies will not be stolen out of these, because this is going to be treated the same as currency is treated, and therefore it will make it impossible for you to bid on this contract.'" (13).

Mr. Silverman went on to say:

"This was Saturday night. I then left for New York and got home on Sunday. On Monday morning from my office I phoned Osborne and said:

"'Wiley, I received the letter and prices and your samples Saturday afternoon, and I sat around all Saturday afternoon until I could see these proposals at the Office of Price Administration, and after explaining to them and they being enthusiastic with the goods I ran into a hitch,' and he said 'What was the hitch,' and I explained to him that what Mr. Carolen told me and I said 'I better go out and get myself a factory, or else a manufacturer to do the bidding for me.'

"Whereupon Wiley said, 'Are you crazy? What do you have to have any manufacturer do the bidding for you? Didn't I tell you that if you could get them to use fiber that I had no deal on with Scoville because the only deal I have with Scoville is on pressed paperboard, and now if you get them to the point where they are going to use fiber, O. K., Max, I will do the bidding. What do you want me to tack on?' And I said '15 per cent above the price you quote me in your letter of August 20th,' he said 'That is fine, that suits me to perfection,' and I requested him to send some samples to the attention of Mr. S. M. Billig at the

> Census Building, and he told me that 'I will carry on from that point and report to me from time to time.'" (13, 14).

Mr. Silverman repeated:

> "He told me 'What do you want to tack on?' I said '15 per cent above the cost,' and he said O. K. and he said 'I will do the bidding.'" (15).

Mr. Silverman then testified that he kept in touch with developments (16), that he took Mr. Esslin of the OPA to Cincinnati to see the Osborne Register Company plant (17), and that he then went back to Washington and got a lot of people to know that he "was interested." (19). He testified:

> "I saw the possibility of a big contract that I could grab off and make some money, and I spent all my time and energy on it." (20).

The opening of bids was on October 4, 1943. (21). The Osborne Register Company was the successful bidder. (22).

Mr. Silverman stated his contention as follows:

> "Q. As I understand it your contention is that Mr. Osborne promised to add to his bid 15 per cent of the price he had quoted you for small size tokens, that is, 15 per cent over $1.05 per thousand, and in that you were to get the 15 per cent. Is that right?
> "A. That is correct.
> "Q. That is what you contend?
> "A. I don't contend. He agreed." (31)

In response to questions by his attorney Mr. Donovan, Mr. Silverman said:

> "Q. I have just one question.
> "I believe your answer when you talked to Mr. Osborne on the 23rd of August and you said something about tacking 15 per cent on that, that was 15 per cent on the small token.
> "Was any mention made as to the particular size token at that time on the 23rd of August?

"A. The understanding was 15 per cent on any token we were to contract. At that time the plan was still vague and indefinite. They didn't have the right size. They didn't have the right size at that time. At that meeting of September 27th they decided in decimal points and finally arrived at .062." (33).

On redirect examination, Mr. Silverman testified:

"By Mr. Gordon:

"Q. I don't believe I quite understood the 15 per cent. The 15 per cent was to be added to what figure?

"A. 15 per cent was to be added to any figure that Wiley was going to bid on, and in this case it happened to be on the small one.

"Q. That is, Wiley was to determine a figure and then add 15 per cent to it and quote the Government the total price? Is that right?

"A. That is right.

"Q. And then out of what he received from the Government he was to give you the 15 per cent?

"A. That is correct.

"Q. But there was no agreement as to what the price to be quoted the Government was, because you didn't know at that moment just what that ought to be. Is that right? (33, 34).

". . . Mr. Donovan. Have you answered the question?

"By Mr. Gordon:

"Q. You were saying it was a closed bid and nobody knew what the price would be.

"A. That is right.

"Q. But it is your contention that whatever the Osborne Register Company got from the Government would be divided into 115 parts and they would take 100 and you would take 15.

"A. All I knew he was supposed to add on 15 per cent if and when we were bidding. That was my contract, or else I would have bought myself a factory and I would have manufactured these myself, and he told me it wasn't necessary." (34)

Thus, the testimony of Mr. Silverman was that it was agreed between him and Osborne on behalf of the Osborne

Register Company that in consideration of Mr. Silverman's refraining from acquiring a factory of his own and refraining from bidding on the ration token contract, the Osborne Register Company would increase its proposed bid to the Government by 15 per cent and would pay the 15 per cent to Mr. Silverman if its bid was accepted. Although not expressly stated, it is implied that, as an additional consideration, Mr. Silverman would aid in securing the contract for the Osborne Register Company.*

Argument.

The Question is Local to the District of Columbia and is Not of General Importance.

The question involved in the decision below was whether or not the alleged agreement, as described in the deposition of Mr. Silverman, was void as against public policy. The mere fact that the alleged agreement between Mr. Silverman and the Osborne Register Company had to do with the proposed manufacture of ration tokens for the United States did not make such an agreement dependent in any way upon Federal law. Certainly no question of the Constitution, or a treaty, or a statute of the United States is involved. The problem is solved by applying the common law relating to contracts, and when the highest court of the

---

* In an attempt to escape from Mr. Silverman's testimony, and after it had become apparent that the motion for summary judgment would be granted, Mr. Silverman's counsel filed an affidavit stating their theory of the case (36). This affidavit did not comply with Rule 56, in that it did not set forth facts which would be admissible in evidence, but merely the conclusions of counsel. It did not, and could not, change the direct testimony of Mr. Silverman contained in his deposition and the District Judge so ruled (41). Many of the conclusions of that affidavit are repeated in the present petition, and we respectfully submit that they should be disregarded to the extent that they differ from Mr. Silverman's deposition.

District of Columbia has made its decision there is no reason to carry further such a case arising in that jurisdiction.

The question therefore is not one "of general importance to the country at large", as contended in the petition.

The Decision of the Court of Appeals Was Clearly Correct.

1.

The alleged agreement is illegal and unenforceable as against public policy because it provided that the Osborne Register Company should increase the amount of its bid on a Government contract and pay the amount of the increase to Mr. Silverman in return for a promise by Mr. Silverman not to bid on the same contract. The very concept of public bidding assumes that there will be open competition and any agreement having the tendency to prevent such competition is contrary to the public interest. Williston on Contracts (Rev. ed. 1937) Section 1663; Restatement of the Law of Contracts (1932) Section 517, Examples 4 and 6; *Atlas National Bank* v. *Holm*, 71 Fed. 489 (C. C. A. 7th, 1896); *Pittsburgh Dredging & Construction Co.* v. *Monongahela & Western Dredging Co.*, 139 Fed. 780 (W. D. Pa., 1905); *In re Salmon*, 145 Fed. 649 (W. D. Mo., 1906); *Reinstine* v. *Rosenfield*, 111 F. (2d) 892 (C. C. A. 7th, 1940); *City of Oakland* v. *California Const. Co.*, 15 Cal. (2d) 573, 104 P. (2d) 30 (1940); *Cianciarulo* v. *Caldarone*, 30 A. (2d) 843 (R. I., 1943).*

---

* Counsel for Mr. Silverman seek to avoid the illegality of the alleged contract by contending that it was a joint adventure. It is apparent, however, that the alleged agreement did not involve a sharing of profits, an essential element. The fifteen per cent was to be paid outright to Mr. Silverman regardless of the financial results from the operation of the proposed Government contract (31, 33, 34). As the Court of Appeals said:

> "It would be a travesty on the term to dignify this bargain by calling it a 'joint venture'. Silverman thought he had a sure thing, admittedly at the government's expense, and without risk to him." (47.)

2.

In this instance competition was not only stifled but an undertaking was made in connection therewith which directly and materially increased the bid which was made to the Government and hence the cost to the Government. In such circumstances the direct injury to the public is patently clear, and the entire understanding must be declared void. Indeed, a mere arrangement increasing a bid to the Government even without an agreement which stifles competition, would be sufficient to make the contract illegal. *Kentucky Association of Highway Contractors* v. *Williams,* 213 Ky. 167, 280 S. W. 937 (1926); *Constructors Assn. of Western Pennsylvania* v. *Seeds,* 142 Pa. 59, 15 A. (2d) 467 (1940); *Associated Wisconsin Contractors* v. *Lathers,* 235 Wis. 14, 291 N. W. 770 (1940).

3.

The alleged agreement was also illegal and unenforceable as against public policy because it required the payment of a fee to Mr. Silverman contingent upon his securing a contract for the Osborne Register Company from the United States Government. That such a contract is illegal under the law of the District of Columbia has been established by many decisions. *Marshall* v. *Baltimore and Ohio R. R.,* 16 How. 314 (1853); *Providence Tool Company* v. *Norris,* 2 Wall. 45 (1864); *Trist* v. *Child,* 21 Wall. 441 (1874); *Oscanyan* v. *Winchester Repeater Arms Co.,* 103 U. S. 261 (1880); *Hazelton* v. *Sheckells,* 202 U. S. 71 (1906); *Crocker* v. *United States,* 240 U. S. 74 (1916); *Noonan* v. *Gilbert,* 63 App. D. C. 30, 68 F. (2d) 775 (1934); *Gesellschaft Fur Drahtlose Telegraphie M. B. H.* v. *Brown,* 64 App. D. C. 357, 78 F. (2d) 410 (1935), cert. den. 296 U. S. 618 (1935).

Providence Tool Co. v. *Norris* and the other cases cited above have not been overruled or limited by *Valdes* v. *Larrinaga,* 233 U. S. 705 (1913), and *Steele* v. *Drummond,* 275

U. S. 199 (1927), upon which counsel for Mr. Silverman now rely. Those decisions are based on their own peculiar facts, and their facts bear little relation to those in the present case, where, according to Mr. Silverman's deposition, one party secretly promised to increase its bid to the Government by 15 per cent and to pay that 15 per cent to the other party in consideration of the other party's making no bid and attempting to secure the contract for the first party.

Surely such a contract is against public policy and is illegal. In the words of the District Court (41), which were quoted with approval by the Court of Appeals (46):

> "The tendency of such an agreement as we have here, apart from other questions, was to have the Government pay 15 per cent more than it would presumably have paid under the circumstances. Such a contract is illegal and void on the ground of public policy and as a consequence the courts have no alternative in such a situation but to so declare it."

Respectfully submitted,

SPENCER GORDON,
GERHARD A. GESELL,
Attorneys for Osborne Register Company.